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No. 89-1506

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1989

JOSEPH M. GEDAN, et al.,

Petitioners,

v.

EARLE A. PARTINGTON, and HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT PARTINGTON'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a request for sanctions for taking a frivolous appeal is itself frivolous when the arguments supporting the appeal, although not ultimately successful, are far from frivolous and are even excellent?

2. Whether a judgment by a court of appeals sanctioning appellees for a frivolous request for sanctions for an allegedly frivolous appeal was well founded in law when the opinion cited Fed. R. App. P. 11, as incorporated by the court of appeals into its rules, as the source of its power to impose such sanctions?

3. Whether appellees upon whom sanctions are imposed for filing a frivolous request are afforded due process when (a) notice that sanctions will be considered is provided by way of requests for such sanctions in the reply brief and an *amicus* brief, (b) appellees decline to request additional briefing on the issue, and (c) a hearing on all issues in the case is held?

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RESPONDENT PARTINGTON'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Earle A. Partington respectfully requests that the petition for a writ of certiorari in No. 89-1506 be denied. In No. 89-1506, Petitioners Joseph M. Gedan and Howard T. Chang seek review of the judgment of the United States Court of Appeals for the Ninth Circuit sanctioning them for their frivolous request for sanctions for an allegedly frivolous appeals taken by Partington. The points raised by Gedan and Chang are of little note

and certainly fail to raise special or important reasons under Supreme Court Rule 10.1 for the writ to be granted.

STATEMENT OF THE CASE

On March 9, 1987, Respondent Partington filed suit in the United States District Court for the District of Hawaii under 42 U.S.C. §1983 against Petitioners Gedan and Chang to prevent them from conducting an attorney disciplinary proceeding against Partington in deprivation of his rights under the United States Constitution, including the right to free speech, guarantees of due process and equal protection, and the right to counsel, under the First, Fifth, Sixth, and Fourteenth Amendments. A2,[1] A8-9; *Partington v. Gedan*, 880 F.2d 116, 117, 119 (9th Cir. 1989) (the opinion below). The Ninth Circuit's description of the attorney disciplinary proceeding and the underlying case (namely, *State v. Clarke*, Haw. S. Ct. No. 10041) is printed in the Appendix to Petitioners' Brief. *See* A2-9; 880 F.2d at 117-20.

On July 1, 1987, in response to a motion filed by the Hawaii Association of Criminal Defense Lawyers (HACDL), which is a Respondent here, the district court granted HACDL permission to file a brief as *amicus curiae;* at the same time, the district court dismissed Partington's complaint the ground of abstention under

[1] The abbreviation "A" followed by a page number is used to refer to a particular page of the Appendix to the Petition for Certiorari. (The same notation was used by Petitioners.)

Younger v. Harris, 401 U.S. 37 (1971), as applied in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). A9; 880 F.2d at 120.

Respondent Partington appealed to the Ninth Circuit and filed his opening brief. *See* A97-147. Petitioners Gedan and Chang, in their answering brief, requested that sanctions be imposed against Partington pursuant to Rule 11 of the Federal Rules of Civil Procedure (FRCP), Rule 38 of the Federal Rules of Appellate Procedure (FRAP), or various statutory provisions. A149-50, A150-51, A167, A188-89. Stating that the "objective good faith" standard of Rule 11 applied to arguments "made on appeal" (citing *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1583 (9th Cir. 1987)), Gedan and Chang argued for Rule 11 sanctions because it was "apparent" that Partington's appeal was "meritless." A189.

On the reply brief, Partington contested Petitioners' claim that "each and every issue raised by him [was] utterly without merit," A191, and requested the imposition of Rule 11 sanctions against Gedan and Chang. A192. On the *amicus curiae* brief, HACDL pointed to the "chilling effect on constitutional rights" of unwarranted sanctions in cases such as this one; HACDL expressed approval of the sanctions against Gedan and Chang as requested by Partington and asked for sanctions on its own behalf as well. A214-15.

The arguments on the merits, as raised by Partington and HACDL, were later unanimously characterized as "excellent, although not ultimately meritorious" by the Ninth Circuit (A37, A38, A81; 880 F.2d at 131, 148), which

affirmed the district court's judgment but sanctioned Petitioners Gedan and Chang for requesting sanctions against Partington for taking an allegedly frivolous appeal. A35-38; 880 F.2d at 130-31. Judge Reinhardt dissented on the merits and would have decided in favor of Respondent Partington. A81; 880 F.2d at 148.

REASONS FOR DENYING THE WRIT

A. It was highly appropriate for the court of appeals to sanction Petitioners for their request for sanctions for the allegedly frivolous appeal taken by Respondent Partington, because an appeal based on "excellent" arguments is, by any objective standard, discernable from a frivolous appeal.

Gedan and Chang argue that their request to the court of appeals for sanctions against Partington for taking an allegedly frivolous appeal was "at least colorable" or "at least arguable" because they had argued that *Younger* abstention, particularly as applied in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), made the result of the appeal "beyond debate." P18-19.[2] Gedan and Chang further argue that if *Younger* abstention did not apply, "colorable arguments *could* be made that, [Partington's constitutional] arguments were plainly disposed of by controlling precedent." P20 n.8 (emphasis added).

Their argument is indistinguishable from a statement that they believed their arguments would prevail. The

[2] The abbreviation "P" followed by a page number is used to refer to a particular page of the Petition for Certiorari.

standard for judging a request for sanctions for frivolity, however, is not whether the request was "colorable" or whether they believed they would prevail. As Gedan and Chang pointed out below (in their reply brief in the Ninth Circuit), the standard for imposing sanctions on appeal is the "objective good faith" standard of Rule 11. A189.

On the appeal, the close questions involved exceptions to *Younger* abstention principles and the application of those principles in *Middlesex*: should *Middlesex*, which also involved attorney disciplinary proceedings, be distinguished from the instant case, or should *Middlesex* be considered dispositive? Was the state tribunal biased on the merits of the proceeding? Had it prejudged the case? In particular, did the tribunal meet the impartiality requirement of *Withrow v. Larkin*, 421 U.S. 35 (1975)? Was an adequate opportunity available to raise constitutional challenges? Did extraordinary circumstances foreclose *Younger* abstention? *Cf.* A21-35, 880 F.2d at 124-30 (majority op.) *with* A51-81, 880 F.2d at 136-48 (Reinhardt, J., dissenting). As Partington argued in his opening brief in the Ninth Circuit, *see* A127-33, and as the dissenting judge correctly pointed out, *Withrow* foreclosed *Younger* abstention because a favorable second decision by the same tribunal in Partington's case would constitute an implicit admission that its first decision was erroneous. A66-67, 880 F.2d at 142-43 (Reinhardt, J., dissenting).

Gedan and Chang would ignore these questions and rely on *Pennzoil*, even though *Pennzoil* presented "an unusual fact situation," 481 U.S. at 17, involving as it did the applicability of *Younger* abstention to Texas bond and lien provisions in postjudgment collection procedures, particularly in light of the "open courts" provision of the

Texas Constitution, *id.* at 15, and not involving any situation remotely similar to attorney disciplinary procedures. By any objective measure, it is frivolous to ignore the close questions raised on appeal and to contend that the arguments were utterly without merit.

This view is confirmed by the Ninth Circuit, which unanimously determined that "[f]ar from being frivolous, Partington's and [HACDL's] arguments that *Middlesex* did not compel abstention were *excellent*, although not ultimately meritorious." A37, A38, A81; 880 F.2d at 131, 148. Judge Reinhardt was persuaded that *Middlesex* did not compel abstention; stating that "*Younger* abstention is inappropriate [here]," he would have reversed the district court and decided in favor of appellant. A81; 880 F.2d at 148 (Reinhardt, J., dissenting). The panel was, therefore, in unanimous agreement that Respondents' arguments were excellent and far from frivolous.

By any objective standard, attorneys should be able to distinguish an appeal based on excellent arguments from a frivolous appeal, for the two are nearly at opposite ends of the spectrum. Gedan and Chang disregarded their duty to determine whether their claim of frivolity was well founded. Sanctions against them were, therefore, appropriately imposed.

B. The Ninth Circuit's judgment sanctioning Petitioners for a frivolous request is consonant with the court's power and is harmonious with decisions in other circuits; that the opinion relied on the Ninth Circuit's incorporation of Fed. R. Civ. P. 11 is irrelevant.

In its decision below, the Ninth Circuit stated that it has "power to sanction [Petitioners] pursuant to Rule 11

[of the Federal Rules of Civil Procedure as incorporated in the Ninth Circuit Rules]." A35; 880 F.2d at 130 (citing *In re Mooney*, 841 F.2d 1003, 1005 (9th Cir. 1988); *Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group*, 823 F.2d 302, 304-05 (9th Cir. 1987); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986)).

Gedan and Chang argue, contrary to the position they took below,[3] that Rule 11 does not support the imposition of sanctions against them because the Ninth Circuit's incorporation of Rule 11 "creates a palpable inter-circuit conflict" with other circuits that do not use Rule 11. P22. The argument elevates form over substance. Other circuits agree with the Ninth Circuit that they have power to sanction frivolous requests for sanctions; the *decisions* are harmonious, even though the bases for arriving at the decisions may be different. *See Meeks v. Jewel Co.*, 845 F.2d 1421, 1422 (7th Cir. 1987) (imposing

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[3] When Gedan and Chang requested that the Ninth Circuit sanction Partington for taking an allegedly frivolous appeal, they relied primarily on Rule 11 (*see* A189), although they suggested other possible bases as well (*see* A149-50, A150-51, A167).

Their reliance below on Rule 11 is nowhere mentioned in their petition for certiorari here. Gedan and Chang repetitively cite Rule 38, FRAP, as the basis for their request below and sometimes note that they relied on other – unspecified – authorities. P5 (made their request "under Fed. R. App. P. 38, and other authority"); P14 (moved for attorneys' fees and costs "pursuant to, *inter alia*, Fed. R. App. P. 38"); P18 (seeking their rule 38 damages below"); P19 (their "request for Rule 38 sanctions"); P20 ("Petitioners' Rule 38 motion").

sanctions on appellee for frivolous request for Rule 38 sanctions); *Aircraft Trading & Services, Inc. v. Braniff, Inc.*, 819 F.2d 1227, 1236 (2d Cir. 1987) (criticizing appellees' request for sanctions when it "border[ed] on the frivolous," and stating that the court will impose penalties for frivolous request for sanctions).

Further, the Ninth Circuit, unlike other circuits, has adopted the Federal Rules of Civil Procedure, "whenever relevant, as part of the rules of [the] court." *Rockwell*, 823 F.2d at 304; *Curl*, 803 F.2d at 1007; Ninth Circuit Rule 1-1 (former Ninth Circuit Rule 5). The Ninth Circuit has thus incorporated Rule 11 of the Federal Rules of Civil Procedure into its own rules. *Mooney*, 841 F.2d at 1005 (citing *Curl*, 803 F.2d at 1007). Gedan and Chang suggest that it is not "clear" that the Ninth Circuit Rules incorporate Rule 11 (despite *Curl*, *Mooney*, and *Partington v. Gedan*) and then point out that the rules adopted by the courts of appeals must be "consistent" with Supreme Court Rules P23. The implicit suggestion of some inconsistency, without a word of explanation, is not worthy of response.[4]

It is unnecessary, however to decide which rule or which other authority forms the correct basis for the Ninth Circuit's judgment imposing sanctions on Gedan and Chang, because this Court "reviews judgments, not

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[4] As a subsidiary claim (left undeveloped in the argument section of their brief), Gedan and Chang state that imposing Rule 11 sanctions against them "upsets the framework under which sanctions against *appellee* parties are to be judged[.]" P17 (emphasis added). Why appellees who burden the court with frivolous requests should be entitled to preferential treatment under Rule 11 is left unexplained.

opinions," *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and "may affirm on any ground that the law and record permit[.]" *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). This Court "recognize[s] the 'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980). Accordingly, the judgment sanctioning Gedan and Chang was well founded in law.

C. Petitioners were afforded due process as to the imposition of sanctions, for Petitioners were provided notice and an opportunity to be heard before sanctions were imposed.

Gedan and Chang allege deprivation of due process in that notice was provided, "if at all, for the first time in the Reply and Amicus Briefs,[5] to which no response is allowed under Fed. R. App. P. 28(c)[.]" P24. They mention the right to " 'some kind of hearing *before* [being deprived] liberty or property.' " P23 (quoting *Zinermon v. Burch*, 58 U.S.L.W. 4223, 4227-28 (U.S. Feb. 27, 1990)). Whether they intend to suggest they were denied such a hearing is unclear.

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[5] Partington and HACDL wonder why Gedan and Chang complain of receiving notice "for the first time" when the reply and amicus briefs were filed, their request for sanctions having been made in the answering brief. Should sanctions against Gedan and Chang have been requested for frivolous conduct *before* the conduct occurred? One is reminded of the White Queen, who screamed and shouted before she pricked her finger with her brooch. *See* Lewis Carroll, Alice in Wonderland and Through the Looking Glass, at 219-20 (Grosset & Dunlap 1948).

Notice to all parties that sanctions would be considered occurred as follows: In the answering brief in the court of appeals below, Gedan and Chang requested sanctions against Partington for having taken an allegedly frivolous appeal. A189, A149-50, A150-51, A167-68. In reply, Partington requested sanctions against Gedan and Chang for their frivolous claim that he had taken a frivolous appeal. A191-92. In the *amicus* brief, HACDL supported Partington's request and entered its own request for sanctions against Gedan and Chang. A214-15. All parties were, therefore, on equal – and sufficient – notice that sanctions against any and all parties would be considered by the court.

The claim that rule 28(c), FRAP, foreclosed Gedan and Chang from an opportunity to be heard is without merit. Gedan and Chang declined even to request additional briefing on the issue of sanctions, and they further declined to address the issue in the hearing that was held – which was a hearing on all issues in the case *before* the sanctions were imposed. Opportunities to be heard were available. Gedan and Chang chose not to take advantage of their opportunities.

The question of how much process is due depends on three considerations: (1) the private interest affected, (2) the risk of an erroneous deprivation of that interest under the procedures used and the probable value of additional procedural safeguards, and (3) the government's interest, including the burdens imposed by the additional safeguards, *Zinermon v. Burch*, 58 U.S.L.W. at 4227 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Gedan and Chang believe they are entitled to extraordinary due process (as to the sanctions) while Partington is entitled to none (as to his underlying claims). *Zinermon* and *Mathews* would have it otherwise. Partington's interest is to be protected from the severe and irreparable damage here to his professional reputation and livelihood, for which there is no state remedy[6] to undo the wrong against him from the erroneous adjudication of ineffectiveness. In contrast, Gedan and Chang's interest is a few thousand dollars, which can be returned to them in the event that the award of sanctions should be reversed (and incidentally is a small fraction of the amount Partington must pay to defend his interests and recover his professional reputation).

For Partington, the Hawaii Supreme Court's final adjudication that he had provided ineffective assistance of counsel came in the face of the following: the client never accused Partington of ineffectiveness, the client never waived the attorney-client privilege, the issue of ineffectiveness was neither raised nor briefed by any party, the Hawaii Supreme Court was not (for it could not have been) privy to attorney-client communications, and neither notice not opportunity to defend was allowed. *See* A99-100 Consequently, there was a grave risk of Partington being erroneously deprived of constitutional rights. In stark contrast, for Gedan and Chang, the risk of

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[6] The most favorable result to Partington in the pending disciplinary proceeding initiated by the Hawaii Supreme Court against him in *State v. Clarke* would be Gedan's dismissal of the proceeding, which would leave the ineffectiveness finding intact and the sixth amendment right to counsel in shambles.

an erroneous deprivation was truly minuscule because the parties had presented their arguments for sanctions, because Gedan and Chang were afforded notice and an opportunity to be heard, and particularly because the Ninth Circuit, like other courts of appeals, is well versed in recognizing frivolous requests. Additional procedural safeguards for Gedan and Chang "would not have improved the accuracy of the [panel's] decision [to impose sanctions]." *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 525 (1983). The courts are already burdened with "the task of reading, analyzing, and judging . . . baseless arguments." *In re Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986). The courts of appeals deplore "the frequency with which lawyers . . . are including in their briefs groundless requests for Rule 38 sanctions" and the attitude that "it can't hurt to ask." A37; 880 F.2d at 130 (quoting *Meeks v. Jewel Co.*, 845 F.2d 1421, 1422 (7th Cir. 1987) (per curiam)). Additional procedural safeguards for Gedan and Chang or others who are sanctioned for frivolous requests would "increase the burden on the court even further." *Miranda*, 710 F.2d at 525.

Gedan and Chang were, therefore, entitled to minimal due process. The due process they received was more than sufficient, for they were afforded notice and opportunity to be heard, and a predeprivation hearing was held even though it was not required. No denial of due process can fairly be claimed in this case.

CONCLUSION

Gedan and Chang fail to show any "special and important reasons" for granting the writ as required under Supreme Court Rule 10.1. Subsection (a) of the rule is inapplicable because the Ninth Circuit's decision below is consistent with decisions in other circuits, even though other circuits have not adopted the Federal Rules of Civil Procedure. Subsection (b) of the rule, which relates to state court decisions, is plainly inapplicable here. And subsection (c) is not applicable because no important question of federal law is implicated.

For the foregoing reasons, the writ in No. 89-1506 must be denied.

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